

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
CIVIL ACTION NO. 1:16-cv-00955

RICHARD E. SWIGER, individually, and	)	
on behalf of all other similarly situated,	)	
	)	
Plaintiff,	)	
	)	JOINT MOTION TO DISMISS
v.	)	
	)	
BREG, INC., VISCENT, LLC, and	)	
ORTHORX, INC.	)	
	)	
Defendants.	)	

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Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, Plaintiff Richard Swiger (“Plaintiff”) and Defendants Breg, Inc., Viscent, LLC, and OrthoRx, Inc. (“Defendants”) jointly ask this Court to dismiss all claims Plaintiff asserted as an individual with prejudice, and the claims of the remaining non-party class members without prejudice. In support of this Motion, the parties respectfully state the following:

1. Plaintiff filed this purported collective action on behalf of Orthotists and Orthotic Fitters employed by Defendants.
2. Plaintiff complained about, among other things, Defendants’ incorrect classification of Orthotists and Orthotic Fitters, and asserted claims under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (“FLSA”) and the North Carolina Wage and Hour Act (“NCWHA”).

3. Plaintiff Swiger has reached settlement of his individual claims with Defendants and consequently, he requests to dismiss those claims with prejudice. Plaintiff requests to dismiss the claims of the non-party class members without prejudice.

4. While Rule 23(e) of the Federal Rules of Civil Procedure does not require court approval of the dismissal of class claims before the class has been certified, the Fourth Circuit has held that, under Rule 23(d), district courts have pre-certification duty to ensure that the dismissal of class claims neither is the result of collusion, nor prejudices the non-party class members. *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1306, 1314 (4<sup>th</sup> Cir. 1978).

5. In this case, it is clear that the dismissal is not the result of collusion.

6. Similarly, it is clear that the dismissal will not prejudice the non-party class members. First, the dismissal is without prejudice. Second, the running of the statute of limitations on the class claims has been tolled since the parties agreed to mediation on September 13, 2016 and will be tolled through the date the Court grants this Motion to Dismiss. Finally, given that this case has not been publicized, the parties have no reason to believe that any non-party class members are relying upon Plaintiff's prosecution of these claims.

Therefore, based on the foregoing, the parties respectfully ask this Court to dismiss this action.

Dated: April 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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This 28th day of April 2017.

/s/ Brian K. Nagatani  
\_\_\_\_\_  
Brian K. Nagatani